Supreme Court, U.S.
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No OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

GREG ANDERSON

Petitioner,

vs.

DANIEL W. KITCHEN, SAND BAY LLC, SUN LAKE LLC, ORCHID BEACH LLC, ROOSEVELT HILLS LLC, JAMES L. AHLSTROM, CLARK A. MCCLELLAN, TERRY WELCH, LYNN KITCHEN, GARY KITCHEN, MATHEW J. KITCHEN, MARK R. KITCHEN, JOHN OR JANE DOE(s) 1 through 10,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Phone: 801 803-8148

QUESTIONS PRESENTED

1. Are private parties, including private attorneys, "state actors" under the Fourteenth Amendment, who act with, and/or receive significant aid from an immune state court judge; in seizing Petitioner's paid-for home without allowing Petitioner to be heard?

2. Does a plaintiff in a 42 U. S.1983 action need to prove conspiracy, between a state judge and private parties that act with the judge in denial of the right to be heard, or only that they willfully acted with the judge, and/or that they received substantial aid from the judge?

3. Has petitioner stated enough facts in his first amended complaint to state a conspiracy case? *(Anderson does not request that the Court answer this question, if a conspiracy does not need to be proven in question two.)*

4. Will petitioner be prejudiced if his pendent state claims are not reinstated inasmuch as he has an unconstitutional eviction judgment against him, without due process and may be prejudiced if he forced to go in front of a second state court judge with the eviction judgment pending?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Greg Anderson. The Respondents are the Defendants in the Tenth Circuit Court of Appeals below, and are: Daniel W. Kitchen, Sand Bay L. L. C., Sun Lake L. L. C., Orchid Beach L L.C., Roosevelt Hills L. L. C., James L. Ahlstrom, Clark A. McClellan, Terry Welch, Lynn Kitchen, Gary Kitchen, Mathew J. Kitchen, Mark R. Kitchen, John or Jane Doe(s) 1 through 10.

Note: No John or Jane Doe's have been named, nor have any other parties.

All of the Respondent parties were represented in the Tenth Circuit Court of Appeals by Bentley J. Tolk, Terry Welch, and James L. Ahlstrom all attorneys of the law firm of Parr Brown Gee and Loveless.

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CITATIONS TO THE OPINIONS BELOW

Petitioner's Petition for Rehearing en banc was dated on August 23, 2010. Petitioner received a letter from the Tenth Circuit Clerk declining to hear the case en banc dated September, 10, 2010. (Appendix, p 40).

The Tenth Circuit Order and Judgment is No. 09-4229, and was filed on July 30, 2010. (Appendix, p 42)

The District Court Order and Memorandum Decision is case No. 2:09-CV-362-TC, was dated the 18th day of November, 2009, and is listed as Document 31, filed 11-18 -2009. (Appendix, p. 50)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). The Tenth Circuit Court of Appeals entered judgment on July 30, 2010. Petition for rehearing or rehearing en banc was denied on September 10, 2010.

OPINIONS BELOW

This action began in the Federal District Court in Salt Lake City Utah. Although Petitioner stated that the case was a Procedural Due Process case, the District Court characterized the case as a conspiracy case, and then dismissed the case on the grounds that the Respondents are not state actors because Anderson

did not state enough facts to state a conspiracy cause of action. If private persons, are named in a § 1983 case, in the Tenth Circuit, they must prove a conspiracy between the State officials, and the private parties. The case was dismissed under Rule 12 of the Federal Rules of Civil Procedure.

Petitioner then appealed the case to the Tenth Circuit Court of Appeals, stating that the case is a procedural due process case and that the District Court pigeonholed the case as a conspiracy case. The Tenth Circuit Affirmed the District Court's Decision inferring that the State Judge's actions of taking Anderson's paid-for home was merely acquiescence, as mentioned in *Flagg Brothers* 436 U. S. 149 (1978).

RELEVANT PROVISIONS

> The Fourteenth Amendment states in part: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.
>
> The Fourth Amendment states: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and

seizures shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceedings for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT

This is a case where Respondents, with the help of a State Court judge, seized Petitioner, Greg Anderson's paid-for home on only the strength of a un-

notarized, page and a half affidavit, (Rec 16-2, App. 82). Anderson was denied due process in a state court case by the court denying him, a opportunity to defend or the right to be heard. At the request of Respondents the judge refused to allow any testimony, and refused to allow Anderson to answer the complaint or defend the complaint. The State Judge stated in open court that he did not know the law, and to add insult to injury, ruled from the bench, without checking the applicable law. (Rec. doc. 7 p 22, ¶ 91) The judge made up his own procedural law. This is exactly the type of case this Court has warned lower courts to be aware of, the chance of erroneous deprivation; and this Court spent seven pages on that exact subject in *Connecticut v. Doehr*, 501 U. S. 1, at 11, a case on point to the case at Bar. See also, *United States v. James Daniel Good Real Property*, 510 U. S. 43.

On or about July 13, 2005, Anderson signed a contract to purchase a 3500 square foot house from Daniel Kitchen through Sand Bay LLC for $105,000, which included in the purchase price, $55,000 to help with materials and labor to remodel the home. Petitioner, Anderson forwarded the Real Estate Purchase Contract (REPC) to United Title Services to close the transaction. The Title Company found a cloud on the title and would not issue title insurance with the cloud on the title. The REPC required sellers to remove the cloud on the title, which they did not do. However, because of past dealings, Anderson trusted the Kitchen Family and remodeled the home making the home worth over $300,000. No money was

required from Anderson to close on the home, other than closing costs, because Respondents agreed to carry the mortgage until the home was remodeled. The remodeling included rewiring the house, new plumbing pipes, a new furnace and duct-work, four new bathrooms, two new kitchens, seven bedrooms redone, a new roof, a new front porch and many other items. The house was completely gutted and then completely remodeled. (doc 7 p 5 - 10)

On or about September, 2005 Anderson entered into a separate 50/50 partnership agreement with the Kitchen family to purchase and develop various real properties. Anderson worked for the partnership for nearly three years receiving no compensation, which in turn paid the $105,000 owed on his home many times over, (Rec. doc 7 p10 - 21).

On or about September, 2008 Anderson was served with an eviction law suit on the subject home. Under Utah law, before a person can be evicted, his status must be reduced to that of a tenant, which Respondents did not do. *Van Zyverden v. Farrar*, 393 P. 2d 486, (Ut. 1964), Further, the Occupying Claimant Statute, U. C. 57-6-(1-7), provides that a person who has made substantial improvements on a property has the right to live on the property until all the issues are settled.

On or about September 9, 2008 Anderson filed a Motion to Dismiss the eviction complaint pursuant to Rule 12(b)(6), of the Utah Rules of Civil Procedure

(URCP), with an accompanying, Notarized Verified Memorandum, (Rec., doc 16-2), which constitutes an affidavit in the State of Utah. (App. p. 68 Rec doc 16-2) Anderson also filed a copy of a Verified Complaint that had been filed in Eighth District Court, in Vernal Utah, (Rec. doc 11-4), to explain the facts of the case, that the home was paid for, and law, Occupying Claimant Statute, and the need to put Anderson in position of a tenant prior to any eviction. which were never addressed by the Eighth District Court in its Findings of Fact and Conclusions of Law. (Compare Anderson's Verified Complaint, Kitchen's un-notarized Affidavit, with Findings of Fact and Conclusions of Law, App. 60 Rec. doc 11-3 p 7)

On or about October 30, 2008, a purported hearing was held on Anderson's Motion to dismiss. At the hearing the judge, also named Anderson, denied Petitioner Anderson's Motion to Dismiss, his right to testify, and ruled from the bench evicting Anderson from his paid-for home, and to add insult to injury, stated in open court that he did not know the law concerning evictions. (Rec. - doc 7 p 10, 22), In *Screws v. United States*, 325 U. S. 91, at 129 this Court stated:

> Generally state officials know something about a individuals basic legal rights. If they do not, they should, for they assume that duty when they assume their office. Ignorance of the law is no excuse for men in general. It is less of an

> excuse for men whose special duty is to apply it, and therefore to know and observe it.

In *Mathews v. Eldridge* 424 U. S. 319, this Court initiated a balancing test to decide what process is due in various Fourteenth Amendment cases. In assessing the first *Mathews* factor -- the importance of private interest at stake, in the majority opinion in *James Daniel Good Real Property,* 510 U. S. 43, 59 - 62 this Court found the seizure of a persons real property caused greater harm to the person than the temporary loss of personal property -- analyzing the second *Mathews* factor -- the need for pre-deprivation process –Justice Kennedy concluded that seizing real property without notice, and without the property owner to present his side of the arguments to the government, creates an unacceptable risk of error. Justice Kennedy then considered the third *Mathews* factor – the nature of the government interest, and whether it justified providing the property owner with only a post deprivation process. The majority held that there was no government interest that justified seizing real property as a means of initiating a civil forfeiture proceeding because under federal law the government could have initiated those proceedings without seizing the property. *United States v. James Daniel Good Real Property,* 510 U. S. 43, 59 - 62.

In the case at bar, there is no government interest at stake. The State Court judge in his official capacity, at the request of Respondents created and

imposed the procedures that denied Anderson his constitutional right to due process. The case at bar mirrors the unconstitutional procedure used by the District Court in *Nelson v. Adams* 529 U. S. 460 (2000), where the District Court Amended the judgment without allowing Nelson to defend against personal liability prior to judgment.

Under Utah law if a person's Motion to Dismiss is denied, then he has ten days to answer the complaint, and request a trial or jury trial, Utah Rules of Civil Procedure, Rule 12(a)(1). Utah and Federal case law mandate a trial. See *Lincoln Financial Corp. v. Ferrier*, 567 P.2d 1102 (Utah 1977), District Court is directed to reinstate Counterclaim, *White v. District Court* 232 P.2d 785, under Real Estate Contract, vender was entitled to notice of default and demand for performance, *Firemans Insurance Co. v. Brown* 529 P. 2d. 419, Purchaser should be given a reasonable time of "intent to forfeit contract", *Pacific Development Co. v. Stewart*, 195 P. 2d 748 (1948 Utah). "The unlawful detainer statute is a summary proceeding and in derogation of common law and it provides a severe remedy that must be strictly complied with before the cause of action may be maintained." *Parkside Salt Lake City Corp., v. Insure-Rite* 37 P. 3d. 1202. Defendant had a right to a jury trial, *Pernell v. Southhall Realty*, 416 U.S. 363 (1974), "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted

at a meaningful time and in a meaningful manner." *Hamdi v. Rumsfeld* 524 U.S. 507, 533, 124 S.Ct. 2633, 159 L.Ed.2d 598 (2004), We have dealt over and over again with the question of what constitutes "the right to be heard" (*Schroeder v. New York*, 371 U. S. 208, 212) *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306, 314 *Sinadach v. Family Finance Corp.*, 395 U. S. 337, 339 In the *Civil Rights Cases* 109 U. S. 3, 11, 17 (1883), this Court pointed out that the Amendment makes void "State action of every kind" which is inconsistent with the guaranties therein contained, and extends to manifestations of "State authority in the shape of laws, customs, or judicial or executive proceedings. *Shelley v. Kraemer* 334 U. S. 1, at 14. In *Brinkerhoff-Faris Trust & Savings. V. Hill*, 281 U. S. 673, 680 (1930), this Court, through Mr. Justice Brandeis stated:

> The federal guaranteed right of due process extends to state action through its judicial as well as through its legislative executive or administrative branch of government.
>
> The action of state courts in imposing penalties of depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment.

> opportunity to defend was put off for another day and another court. *Brinkerhoff-Faris Trust & Savings. v. Hill, supra.* Cf. *Pennoyer v. Neff,* 95 U. S. 714 (1878)

In *Wyatt v. Cole,* 504 U. S. 158, at 161 this Court stated:

> The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails. *Carey v. Piphus,* 435 U. S. 247, 254-257 (1978).

This court succinctly defined *Luger v. Edmondson Oil Company* 457 U. S. 922, a similar case to the case at bar, stating:

> The Court found potential § 1983 liability in *Lugar* because the attachment scheme was created by the State and because the private defendants, in invoking the aid of state officials to attach the disputed property, were "willful participant[s] in joint activity with the state or its agents." *Id.* at 941 *Wyatt v. Cole,* 504 U. S. 158, at 162.

That is exactly what happened in the case at

bar, except it is an "abuse of authority" case, (as opposed to a unconstitutional statute case), where the judge abused his authority, as mentioned in *Lugar, Id.,* and defined in *Monroe v. Pape* 365 U. S. 167 (1961).

REASONS FOR GRANTING THE WRIT

The case at bar concerns two major issues upon which the Circuits disagree. Further, under 28 U. S. C. A.,1657 (b), consistency among the Circuits is a Congressional priority, therefore, Congress established that the Judicial Conference of the United States may actually modify the rules adopted by the courts to determine the order in which civil actions are heard in regards to Circuit splits. The case at bar concerns the taking of Petitioners home, a real property interest, and obviously an enumerated right under the Constitution, that mandates due process.

Including the two major issues the Circuits disagree on, there are four reasons for granting the Writ, as follows:

I. Conspiracy: Some Circuits believe when state judges act with private parties, or give significant aid to private parties, in denying a persons right to be heard, it is actionable under § 1983; and other Circuits, including the Tenth Circuit believe that if a person does not adequately state and then prove conspiracy between a State Official and defendants, as opposed to showing they acted together, or obtaining significant aid from a State Official, there is no "state

action."

II. Abuse of Authority: Some Circuits, including the Tenth Circuit do not acknowledge the "abuse of authority doctrine" that this court referred to in *Lugar, Id.*, at 940, and completely defined in *Monroe, Id.*, 174 to 189, spending sixteen pages examining the legislative intent of Congress in enacting § 1983.

III. Review is needed to ensure uniformity on the fundamental enumerated rights of owning real property without concerns of arbitrary seizure, by state courts that deny due process. Further and more broadly, the Tenth Circuit Court of Appeals has failed to recognize harm to citizens whose property has been seized by unethical attorneys together with a rogue Judge that abrogate the fundamental principals of the Fourteenth Amendment, thereby placing unconstitutional limitations on the meaning of "State Action," and due process. In addition, Circuit splits create unnecessary litigation because of arguments as to who is right, and this is especially true on major issues such as Fourteenth Amendment issues, where there is a massive amount of litigation in both state and federal courts. Review by this Court is merited.

IV. Attorney liability is a issue that has rarely been mentioned by this Court, and should be further addressed. The standard for private attorneys being liable in denying a person due process should be the same as for other private persons, according to *Wyatt*

v. Cole 504 U. S. 158, (1992). In the case at bar, Petitioner sued the Respondent attorneys as private parties, and not officers of the Court; however the Tenth Circuit held that "private attorneys by virtue or being officers of the court, do not act under color of state law." The issue was not correctly addressed, and merits a decision by this court.

CIRCUIT-SPLITS, CLARIFICATION, UNIFORMITY

[I, II, III] There is a split in the Circuits on various issues that should be clarified to provide uniformity between the Circuits. The Tenth Circuit expressly acknowledged in *Gallagher v. Neil Young Freedom Concert.* 49 F. 3d 1442, at 1454 (10th Cir.) that the requirement in some circuits is conspiracy, rather than just acting in concert or receiving significant aid from a State official stating:

> These Courts conclude that "[a] requirement of the joint action charge . . . is that both public and private actors share a common unconstitutional goal." *Cunningham v. Southlake Ctr. For Mental Health, Inc.*, 924 F. 2d 106, 107(9th Cir. 1991), [sic] [7th Cir.], *Malak v. Associated Physicians, Inc.* 784 F.2d 277, 281-84 (7th Cir. 1986), *Wagenmann v. Adams*, 829 F. 2d. 196, 209-11 (1st Cir).

The Eighth Circuit in *Roudybush v. Zabel*, 813,

F.2d 173 at 177 did not acknowledge the "abuse of authority doctrine," in spite of the fact they quote *Lugar, Id.*, addressing the issue on the same page. The Sixth Circuit does not acknowledge the "abuse of authority doctrine." See *Place v. Shepherd*, 446 F.2d 1239, 1244-1245 (Sixth Cir.). The Seventh Circuit does acknowledge the "abuse of authority doctrine," *Malak, Id.*

In *Beedle v. Wilson* 422 F.3d 1059, (10th Cir.) 2005), the Tenth Circuit Stated:

> Because the attorney defendants are private parties, Mr. Beedle can only state a cognizable § 1983 claim against them if he adequately alleges that those defendants conspired with the Hospital to violate his federal rights. See *AM. Mfrs. Mut. Ins. Co. v. Sullivan* 526 U. S. 40, 49-50.

As in *Beedle, Id.*, the conspiracy requirement was mandated in the case at bar in the District Court and Tenth Circuit Court of Appeals. It does not make sense, nor is it logical that a plaintiff could sue a state official as a "state actor," but must prove conspiracy to sue a private person who acts with that state official. If, for instance, they were equally liable in a deprivation, but a plaintiff did not prove conspiracy, the State, or State Actor would be liable for the full amount of the judgment, and the private person would not be liable because a conspiracy was not proven.

The Tenth Circuit's narrow view is that private parties must conspire, not just act with, or receive significant aid, from an immune judge in denying the right to be heard; in order for a defendant's actions to qualify as "state action" under § 1983, *Beedle v. Wilson* 422 F. 3d. 1059, at 1073. However, this Court has stated:

> It is enough that he is a willful participant in joint action with the state or its agents. Private parties, jointly engaged with State officials in the challenged action, is action "under color of law" for the purpose of § 1983 actions, *Dennis v. Sparks* 449 U. S. 24, 27 (1980), a unanimous opinion.

The issue of whether private persons jointly engaged with state officials, invokes § 1983, or a conspiracy is necessary with state officials, in order to invoke the Fourteenth Amendment, is a major split among the Circuits that should be clarified by this Court.

The case at bar is in line with the *Sniadach,* 395 U. S. 337, line of cases where no government official was named in any of those cases, yet plaintiffs were denied due process. It stands to reason that if a person does not have to name a government official in a § 1983 action, he does not have to prove a conspiracy. "It is enough that he is a willful participant in joint activity with the State or its agents." *Dennis v. Sparks*

449 U. S. 24, 28, quoting *United States v. Price*, 383 U. S. 787, 794 (1966).

Besides the conspiracy requirement, the Tenth Circuit does not recognized the "abuse of authority doctrine," in the case at bar, and continues to quote *Torres v. First State Bank of Sierra County,* 588 F.2d 1322, which in turn quotes a dinosaur case, *Bottone v. Lindsley* 170 F.2d 705 (10th Cir 1948), and asserts it is the leading case, *Torres Id.*, at 1326, in spite of the fact, both cases are prior to *Lugar, Id.*, and *Dennis v. Sparks, Id.*, and should not be claimed as precedents.

The Tenth Circuit also stated:

> We do not think that the color of law" reference in § 1983 was intended to encompass a case such as this one, where the only infirmities are the excesses of the court order itself, subject to immediate modification by a court having jurisdiction over the parties and subject to the normal processes of appeal. *Torres Id.*, at 1326

There is no mention as to whether or not the *Torres Id.*, Court applied the *Mathews v. Eldridge Id.*, balancing test to decide the nature of the government interest, and whether or not it was justified in providing the property owner with only a post deprivation process. In *Torres, Id.*, at 1326 the Tenth Circuit stated:

> This a case where private parties only were involved in state court litigation, and it is alleged that the order is not only erroneous but infringes one party's rights to procedural due process.

The Tenth Circuit made the same argument in the case at bar, (Appendix, p. 48). ("Misleading a state court judge," who in turn seized Petitioners home does not constitute significant aid.) Does not a State Court Judge have a duty to make a independent decision rather than ruling from the bench, while stating that he does not know the law? Further, how can it be that private parties only are involved in litigation? In addition, if it was private parties only that were engaged in the litigation in the *Sinadach, Id.*, line of cases and in *Lugar, Id.*, then, why did they all prevailed in this court. Finally, there is no word about conspiracy in those cases. See *Dennis v. Sparks* 449 U. S. 24, 27 (1980).

> It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting "under color" of law for purposes of § 1983 actions. *Adickes v. S. H. Kress & Co.*, U. S. 144, 152 (1970); *United States v. Price*, 383 U. S. 787, 794 (1966).

This court has acknowledged there is a

distinction between joint action with a judge and conspiracy with a judge, otherwise there was no need for both concepts to have been mentioned in *Dennis Id.,*. This Court stated:

> Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge. *Dennis Id.*, at 449.

Footnote 4 in *Dennis, Id.*, reaffirms this Courts position stating:

> To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willing participant in joint activity with the State or its agents. *United States v. Price*, 383 U. S. 787, 794 (1966)."

In *Torres, Id.*, at 1326 the Tenth Circuit stated:

> We do not think that the "color of law" referenced in § 1983 was intended to encompass a case such as this one, where the only infirmities are the excesses of the court order itself, subject to immediate modification by a court having jurisdiction over the parties, and subject to the normal processes of appeal.

Appeals take more than 50 days, therefore, the above statement does not comport with *Connecticut v. Doehr* 501 U. S. 1 at 15 (1990), quoting *Fuentes v. Shelvin*, 407 U. S. 67 at 86, (1972), stating:

> The Fourteenth Amendment draws no bright lines around three-day, 10 day or 50 day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause.

In *Doehr, Id.,* the judge signing an order simply placing a lien on Doehr's home constituted state action, and denied Doehr due process. Conspiracy was not mentioned in Doehr. This Court acknowledged the issue and stated:

> . . . our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments as liens, "are subject to the strictures of due process" *Peralta v. Heights Medical Center, Inc.*, 485 U. S. 80, 85 (1988) (citing *Mitchell, supra*, at 604; *Hodge v. Muscatine County*, 196 U. S. 276, 281 (1905)). (page 12)

In the case at bar Petitioner has been denied access to his home for more than two years, and cannot appeal in state court without filing a new lawsuit in state court. See Court of Appeals, sua sponte decision, (Respondent's Exhibit "B" Tenth Cir.) and Eight District Court Order, (Rec. doc. 11-3) so there is no immediate appealable relief available, as claimed above in *Torres, Id.*, because Anderson tried to appeal to the Appellant courts in Utah.

Further, if the Judge signing an order placing a lien on Doehr's home constituted "State Action," then in the case at bar; the judge signing a order seizing Anderson's home without due process, constituting a much more egregious act than a lien, and amounted to state action. Also, this court has stated in *Daniels v. Williams* 474 U. S. 327.

> The standard is not negligence, [nor is it conspiracy.] The standard is an affirmative act. The standard is deprivation. Deprivation is an affirmative act and not an negligent act. The touchstone of due process is protection against arbitrary action of the Government." *Dent v. West Virginia*, 129 U. S. 114 123 (1889).

This court in speaking of cases such as the one at bar stated in *Lugar, Id.*

> Beginning with *Sniadach v.*

> *Family Finance Corp.*, 395 U. S. 337 (1969, the Court has consistently held that constitutional requirements of due process apply to garnishment and prejudgment attachments procedures whenever officers of the State act jointly with a creditor in securing the property in dispute. *Sniadach* and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975), involved state-created garnishment procedures; *Mitchell v. W. T. Grant* 416 U. S. 600 (1974), involved execution of a vender's lien to secure disputed property. In each of these cases state agents aided the creditor in securing the disputed property; but in each case the federal issue arose in litigation between creditor and debtor in the state courts and no state official was named. Necessary to that conclusion is the holding that the challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment (*Lugar Id.*, page 932-33, (Emphasis Added).

The case at bar is in line with the *Sniadach,* line of cases mentioned above, where no government official was named as in *Fuentes, Id.*, which stated.

> The constitutional right to be heard is a basic aspect of the duty of

> government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of the requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. *Fuentes v. Shevin* 407 U. S. 67 (1972)

The case of *Mathews v. Eldridge*, 424 U. S 319, 335, propounds three issues to be evaluated in deciding what due process requires, (1) the private interests at stake, (2) the government's interest, (3) and the risk that the procedures used will lead to erroneous decisions. The evaluation has nothing to do with conspiracy between the court and defendants. If defendants act with an immune judge to bypass a persons due process rights, they should be held liable just as in *Lugar, Id.*

In *Lugar, Id.,* Footnote 10, this Court cited various other cases and then stated:

> Each of these cases involved litigation between private parties in which the plaintiffs alleged unconstitutional discrimination. In each

> case, the only inquiry was whether the private-party defendant met the state action requirement of the Fourteenth Amendment. Once that requirement was met, the courts granted the relief sought.

This Courts ruling in *Goldberg v. Kelley* 397 U. S. 254 (1970), gives clear guidance to the courts in determining what due process must be given a person who is in jeopardy of losing his paid-for home.

> The fundamental requisite of due process of law is the opportunity to be heard. (Citations omitted). The hearing must be at a meaningful time and in meaningful manner. (Citations omitted) . . . There principles require that a recipient have timely and adequate notice detailing the reasons for the proposed termination, and a effective opportunity to defend by confronting any adverse witness, and by presenting his own arguments and evidence orally, *Goldberg, Id.*, at 267.

In *Nelson v. Adams U.S.A., Inc.*, 529 U. S. 460, 466 (2000), a case that is not only on point, but also mirrors the case at bar, Justice Ginsburg writing for this court stated:

> We hold that the District Court erred in amending the judgment

> immediately upon permitting amendment of the pleading. Due process as reflected in Rule 15 as well as Rule 12 required that Nelson be given an opportunity to respond and contest his personal liability for the award after he was made a party and before the entry of judgment against him.
>
> The opportunity to respond, fundamental to due process, is the echo of the opportunity to respond to the original pleadings under Rule 12(a)(1)
>
> To summarize, Nelson was never afforded a proper opportunity to respond to the claim against him. Instead, he was adjudged liable the very first moment his personal liability was legally at issue.

See Anderson's First Amended Complaint (Rec. doc 7, paragraphs 26-30, 36, 40), concerning the Eighth District Court's ruling on Rule 12 of the Utah Rules of Civil Procedure, and denying Anderson a chance to answer the complaint.

Rule 12)(a)(1) of the Utah Rule of Civil Procedure mirrors the Federal Rule, and states:

> (a)(1) if the court denies the motion or postpones its disposition until

> the trial on the merits, the responsive pleading shall be served within ten days after notice of the trials action.

The State trial court refused to allow Anderson, his right to answer the complaint by splitting the case into two cases. (Rec. doc 11 p 4 ¶ 7, doc 11-3 ¶ 5). If Anderson would have been allowed to testify, he would have been able to prove that the home was paid for by three years of hard work for the partnership. At best the decision in Eighth District Court was guesswork, nothing more than a craps shoot on the part of Judge Anderson. This Court stated:

> Nelson's winning argument . . . rests on his right to have time and opportunity to respond to the claim once Adams gained leave to sue Nelson in his individual capacity, and thereby to reach beyond OCP's corporate till into Nelson's personal pocket. *Nelson, Id.* at 469

> We say . . . that judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend what due process affords every party against whom a claim is stated. As judge Newman wrote in his decent: "The law, at its most fundamental, does not render judgment simply because a person might have been found liable had he been

charged." *Nelson Id.,* at 471

As this Court held that such action violated the corporate president's due process rights since he had no opportunity to defend. The District Court had usurped his right to have time and opportunity to defend the claim. Conspiracy was not an issue in *Nelson, Id.,* or *Goldberg, Id.*.

Anderson was refused time and opportunity to respond after his 12(b)(6) motion was denied. This was accomplished by Respondent-attorneys misrepresenting the law and facts to Judge Anderson. Judge Anderson in one fell swoop denied Petitioner Anderson's 12(b)(6) motion and ruled for Respondents without testimony or confrontation from either side. The decision denied Anderson his Fourteenth Amendment due process rights, and his Utah Rules of Civil Procedure rights under Rule 12(a)(1).

In *Connecticut v. Doehr* 501 U. S. 1, a case where a Petitioner claimed he was beat up by Doher, and attached Doher's home without a hearing. This Court stated:

> . . . the reviewing judge in a case like this could make no realistic assessment based on the plaintiff's one-sided self-serving and conclusory affidavit and complaint, particularly since the issue does not concern ordinary uncomplicated matters like the existence

> of a debt or delinquent payments that lend themselves to documentary proof. See *Mitchell, Id.* at 609.

In the case at bar, Defendants admit that numerous improvements were made by Anderson to his home (doc 11-3 ¶ 5, App. 62). They misrepresented the law and facts to the judge, which makes the case the type of case this Court was talking about in *Doher, Id.*.

In *Luger Id.*, this Court quoting the Fourth Circuit Court of Appeals stated:

> The court held that a private party acts under color of state law within the meaning of § 1983 only when there is a usurpation or corruption of official by the private litigant or a surrender of judicial power to the private litigant in a way that the independence of the enforcing officer has been compromised to a significant degree. (Page 922)

There is no question that Judge Anderson surrendered his judicial power to Respondents by denying Anderson a right to respond to Respondents Complaint after Anderson's 12 (b)(6) motion was denied. Whether or not there was a conspiracy is insignificant as is shown by the above statements of this court.

The Seventh and Tenth Circuit case law is in conflict with this courts case law, as to what constitutes state action, in a due process case." Both Courts misread *Lugar, Id.*

In the case at bar, the District Court quoted *Yanaki v. Iomed, Inc.*, 415 F. 3d. 1204, 1209 (10th Cir. 2005), a stating:

> [plaintiffs] do not challenge the constitutionality of the state laws under which the Search and Enforcement Orders were issued. Indeed, Plaintiffs assert that issuance of the Orders was unlawful under state law. Without a challenge to the constitutionally of the state laws underlying the Search Order and accompanying Enforcement Order, the conduct of which Plaintiffs complain cannot be attributed to a decision of the state because "[Defendants] were acting contrary to the relevant policy articulated by the State. *Lugar, Id.*, 457 U. S. At 940. (Underline added) (*Yanaki* was a split decision, with judge Holloway writing in decent. Judge Holloway has been on the Tenth Circuit Court since 1958)

It is important to note that the above underlined statement is taken out of context in *Lugar Id.*, and this Court did clarify the statement and the law as follows:

> Nor did they have the authority of state officials to put the weight of the State behind their private decision. *i. e.*, this case does not fall within the abuse of authority doctrine recognized in *Monroe v. Pape* 365 U. S. 167 (1961), *Lugar* at 940.

This court has never held that a statute must be unconstitutional in order for a Plaintiff to evoke a procedural due process claim.

In *Brinkerhoff-Faris Trust & Savings. V. Hill*, 281 U. S. 673, 680 (1930), the Court, through Mr. Justice Brandeis stated:

> The federal guarantee of due process extends to state action through its judicial as well as through its legislative executive or administrative branch of government.
>
> The action of state courts in imposing penalties of depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. . . . opportunity to defend was put off for another day and another court.

Brinkerhoff-Faris Trust & Savings. V. Hill, supra. Cf. *Pennoyer v. Neff*, 95 U. S. 714 (1878)

> In applying the rule of *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), it is clear that the common-law rules enunciated by the state courts in judicial opinions are to be regarded as a part of the law of the State, *Shelley v. Kraemer* 334 U. S. 1, at 17, ft nt.19.

The statement is clear that a judicial opinion is to be regarded as State law. So, if a judicial opinion is state law, whether or not a statute is unconstitutional is a non issue.

The case at bar mirrors *Lugar, Id.*, except it is a "abuse of authority" case, as defined in *Lugar*. at 140, *Yanaki Id*, is in direct conflict with *Screws v. United States* 325 U. S. 91 (1945), and *Monroe Id.*, This court for a second time clarified the *Lugar, Id.*, stating:

> As is clear from the discussion in Part II, we have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for the purposes of the Fourteenth Amendment.

This Court then cited *Adickies v. S H Kress & Co.* 398 U. S. 144, 152 (1979), and *United States v. Price*, 383 U. S., at 794; and for a third time, this Court again clarified the meaning of *Lugar, Id.*, in the ft. n. stating:

> [t]he claim is that the action as taken, even if it were just line by line in accordance with Virginia law–whether or not they did it right, the claim is that it was in violation of Lugar's constitutional rights." *Id* at 19.

This court was very clear, that it does not matter if the actions taken by the state and defendants was in accordance with the law, or in violation of the law. The issue is, was the action taken by the State and defendants in violation of Lugar's constitutional rights? This Court for a fourth time clarified the law by stating:

> The Court of Appeals erred in holding that in this context "joint participation" required something more than invoking the aid of state officials to take advantage of state- created attachment procedures. That holding is contrary to the conclusions we have reached as to the applicability of due process standards to such procedures. Whatever may be true in other contexts, this is sufficient when the State has

> created a system whereby state officials will attach property on the *ex parte* application on one party to a private dispute. *Lugar Id.*, at 942.

Taking ones paid-for home without allowing him to be heard in a meaningful time and manner is no different than an ex parte application, because there is nothing a person can do except sit and watch the one sided event. In the case at bar it was a $300,000.00 paid for home that was taken by the Court in about a twelve minute period of time. (Rec. doc 11-2 p 6)

ATTORNEY LIABILITY

Concerning the case at bar, in the Utah State Court there were three attorney-Respondents, and a State Court Judge that knew or should have known the law on the following major issues.

1. That denying Anderson a right to be heard and defend by not being allowed to respond to the Complaint would deny him his Constitutional rights. *Nelson Id.*

2. Forcing Anderson to go to another court to defend against a unconstitutional and unlawful eviction under state law, would deny him his constitutional rights. *Armstrong v. Manzo Id.*

3. Rule 12 (a)(1) of the Utah Rules of Civil Procedure mandated that Petitioner had ten days to

answer the complaint after the judge denied the motion to dismiss.

4. Anderson's claim that the home was paid is an issue of material fact and mandates more than a summary disposition, (dismissal under URCP 12(b)(6)).

5. State Law mandated a trial. *Lincoln Financial Corp. v. Ferrier*, 567 P.2d 1102 (Utah 1977).

6. Anderson had a right to live in his home until all the issues were decided. Occupying Claimant Statute, Utah Code. 57-6.

The above stated issues are all major issues. A private citizen has the responsibility of knowing and respecting the law. Can we not expect the same from attorneys and our judges?

By reading Respondent attorney's State Court brief, there is no question the express purpose of the brief was to deny Petitioner his right to be heard, (Record doc 16-4). The judge stated in open court that he did not know the law, then ruled from the bench, giving Respondents everything they asked for. If there was ever a case where attorneys should be liable for their actions in court, it is this case. The above six issues of law are not narrow issues, and there are numerous citations on each issue all in accord.

Although this Court did not expressly state that

attorneys as private parties could be sued under § 1983 if they acted with the state in denying someone their constitutional ri ,nts. This court at minimum insinuated that Robbins, an attorney could be sued in *Wyatt v. Cole,* 504 U. S. 158, at 169 by stating:

> Because we overturn the judgment, we must remand, since there remains to be determined, at least, whether Cole and Robbins in invoking the replevin statute, they acted under color of state law within the meaning of *Lugar, Id.*

Without putting words in this courts mouth, it seems to be saying that Cole, and Robbins, his attorney would be liable if the facts of the case show that they are state actors as defined by *Lugar, Id.,* § 1983 and the Fourteenth Amendment.

Anderson agrees that lawyers are usually private persons as defined by § 1983, but private persons unlawfully acting with a state official are acting under color of state law, *Dennis v. Sparks, Id.,* at 27-28. So when does a private person become liable under State action? In *Daniels v. Williams* 474 U. S. 327, this Court stated:

> The standard is not negligence, [nor is it conspiracy.] The standard is an affirmative act. The standard is deprivation. Deprivation is an

> affirmative act and not a negligent act. "The touchstone of due process is protection against arbitrary action of the Government." *Dent v. West Virginia*, 129 U. S. 114 123 (1889) (331).

Respondents and Judge Anderson affirmatively acted together, and those actions defrauded Anderson of his paid-for home, by denying him a chance to answer the complaint, counterclaim, and have a trial. The request of Respondents (doc 16-4 p 5-6), claiming the issues on Anderson's paid-for home should be heard in another action, is in direct violation of long established Utah case law *Lincoln Financial Corp. v. Ferrier*, 567 P.2d 1102 (Utah 1977), *White v. District Court* 232 P. 2d 785 (Utah 1951), and statutory law (Occupying Claimant Statute Utah Code § 57-6-4(2)(a) is obviously an affirmative act. Inasmuch as Petitioner brought up the above cases in his Memorandum in Support of his Motion to Dismiss, Respondents knew or should have known the law (doc 16-2 p 11). Furthermore Respondents, Daniel Kitchen, and Mathew Kitchen were both in the courtroom, representing the Kitchen family, and they knew Anderson's home was paid for. Also, Respondents misrepresented ¶ 10.1 of the Real Estate Purchase Contract to the court. (Rec. doc 7 p 8 ¶ 31 -32)

In *Zahrey v. Coffey* 221 F. 3d 342, (2nd Cir.) the Second Circuit stated:

> The fabrication of evidence in and

> of it's self does not impair ones liberty, and therefore does not impair one's constitutional right, *Id.* at 348.

Rather the *Zahrey* court explained that the fabrication of evidence must precipitate a deprivation of liberty in order to violate a constitutional right. *Id.*

In the case at bar, if the State Court Judge would have preformed his duty and allowed due process, we would not be here today. His decision at best was precipitated by the Respondent's misstatements of the law and facts. Anderson would have sued the judge if he could have, (Rec. doc 7 p 21). Anderson has been in five courts trying to get justice for his paid-for home that was purloined by Respondents, including the attorney-Respondents. Are the attorney-Respondents not liable for their acts of purloining Anderson's home?

There is a huge out cry for tort reform in America. This court could act first in defining attorney liability on constitutional issues in the Federal Court system. Holding attorneys liable when they misrepresent the law and facts to a judge would go a long way toward tort reform in Federal Courts. This Court should look at the issues from a pro se litigant's prospective. The amount of money unscrupulous and unethical attorneys cost tax payers, is one of the major reasons the court system is clogged up. Are only the non-lawyer Respondents liable for the actions of their attorneys? Using the case at bar as an example, if the

State Court judge would have done his job, or if the Respondent-attorneys would not have misrepresented the law and facts, we would not be here today, nor would the case have ever been in Federal Court.

The purpose of the Fourteenth Amendment is to protect individuals from the State. This Court has ruled that attorneys as officers of the court are not liable under § 1983. But, are they not liable for their actions as private persons. And why should they not be fully liable to the opposite side if they break their Rules of Professional Conduct, by misstating the law and facts in a state court, just as a medical doctor is liable for his actions if he cuts off the wrong foot? A lawyer should not be able to purloin a persons paid-for home by misrepresenting the law and facts to a State Court Judge without being liable.

It does not make sense to make the non attorney Respondents liable, who act with a judge in denying Constitutional rights but let Respondent-attorneys off the hook, when non-attorney-Respondents hired the three attorneys because the were suppose to know the law. Or, were the Respondent-attorneys hired because could make a side deal with the judge. Or, because the Respondent-attorneys could trick the judge to go along with their private conspiracy, and the private conspiracy is expressly acknowledged by Respondents, (Rec. doc 11, p 12 ¶ 10).

In case at bar the State Court Judge ruled from the bench, while simultaneously stating in open court

that he did not know the law, (Rec. doc. 7 p. 22 ¶ 91) which denied Anderson the right to be heard, which in turn cost him his paid-for home. This Court addressed such a situation stating:

> A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order. *Lugar Id.* at 936-7

CONCLUSION

The Fourteenth Amendment issues presented in this case are recurring and people will not be secure in their belongings, from rogue judges, and unscrupulous attorneys until the issues in this case are clarified by this Court.

Respectfully Submitted February, 2011.

Greg Anderson
1446 West 14600 South
Bluffdale, Utah 84065
Phone: 801 803-8148

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GREG ANDERSON Plaintiff - Appellant, v. DANIEL W. KITCHEN, et. al., Defendants - Appellees.	No. 09-4229 D. C. No. 2:09-CV-00362 -TC (D. Utah)

ORDER

Before HARTZ, Circuit Judge, BRORBY, Senior Circuit Judge, and O'BRIEN, Circuit Judge.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was

transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

ELISABETH A. SHUMAKER, Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GREG ANDERSON Plaintiff - Appellant, v. DANIEL W. KITCHEN, et. al., Defendants - Appellees.	No. 09-4229 D. C. No. 2:09-CV-00362-TC (D. Utah)

ORDER AND JUDGMENT*

Before HARTZ, Circuit Judge, BRORBY, Senior Circuit Judge, and O'BRIEN, Circuit Judge.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App P. 34(a)(2), 10th Cir. R. 34. 1 (G). The case is not binding precedent, except under the doctrines of the law of the case, res

Greg Anderson appeals from the district court's order dismissing his civil rights suit against the defendants. He brought the action pursuant to 42 U. S. C. § 1983, alleging that the defendants had wrongfully and unconstitutionally procured a state court eviction against him. The district court dismissed the action because it concluded that the defendants, who are private parties could not fairly be said to be state actors for the purposes of § 1983 or the Fourteenth Amendment. We agree, and therefore affirm the dismissal.

BACKGROUND

In his First Amended Verified Complaint, Mr. Anderson alleged that he was the purchaser of a home from defendant Daniel W. Kitchen under a Real Estate Purchase Contract (REPC). He contended that notwithstanding his rights under the REPC and his performance of its terms, a Utah state district court wrongfully entered an eviction order granting possession of the home to Mr. Kitchen. Mr. Anderson offered two explanations for this unfavorable state court result. First, he alleged the defendants misrepresented facts and law in the eviction proceeding to obtain the order. Alternatively, he

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judicata, and collateral estoppel, It may be cited, however, for its persuasive value consistent with Fed. R. App P. 32.1 and 10th Cir. R 32.1.

contended that "[t]hrough information and belief there is some type of collusion and or quid pro quo going on between Defendant Clark McClellan, his law firm and [state court] Judge Anderson in numerous actions in the Eighth District Court." R. at 90.

Mr. Anderson did not sue Judge Anderson, the state court judge who ordered the eviction, because he rightly recognized that Judge Anderson had judicial immunity. But his complaint did rely heavily on what happened in Judge Anderson's courtroom. Specifically, he alleged a denial of procedural due process in connection with the eviction. Because of defendants' misrepresentations, he charged, the state court had (1) denied Mr. Anderson's motion to dismiss; (2) failed to permit him to prove that the house was paid for; and (3) failed to permit him to file an answer to the eviction complaint. *Id.* at 77. [1]

Prior to filing his federal court complaint, Mr. Anderson attempted to appeal Judge Anderson's

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1. In addition to his procedural due process claim, Mr. Anderson contends that his complaint states constitutional claims for deprivation of a liberty interest, unconstitutional seizure, and denial of equal protection, all based on the wrongfully-obtained eviction order. Aplt. Opening Br At 12, 18-24. To the extent that a liberal construction of his pro se complaint could be viewed to include these claims, they fail for the same reasons as his procedural due process claim.

eviction ruling to the Utah Court of Appeals. But that court dismissed his appeal for lack of jurisdiction because it concluded that the eviction order was not a final, appealable judgement. Thus, state proceedings between the parties remained ongoing at the time Mr. Anderson filed his federal § 1983 action.

The defendants subsequently filed a motion to dismiss the federal action, on three grounds. They contended the action was barred by Utah's judicial proceeding privilege; that there was no state action present to invoke federal question jurisdiction; and that the federal district court should abstain from hearing the case pending the outcome of the state court litigation. 2 The district court dismissed the action based on lack of "state action." It also declined to exercise supplemental jurisdiction over Mr. Anderson's state law claims.

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2 The defendants sought abstention under the *Colorado River Conservation Dist. v. United States*, 424 U. S. 800 (1976), based on a separate action Mr Anderson had filed in Utah state court containing many of the same claims he has asserted in this action We discern no abuse of discretion in the district court's decision to reach the merits of Mr. Anderson's federal constitutional claims rather than dismissing or staying this action under *Colorado River, See Rienhardt v. Kelly*, 164 F. 3d 1296, 1302 (10th Cir. 1999) (applying abuse of discretion standard to review of district court's decision concerning Colorado River abstention).

ANALYSIS

We review de novo the district court's order granting the defendants' motion to dismiss. *See Colo. Envtl. Coal. v. Wenker*, 353 F. 3d 1221, 1227 (10th Cir. 2004). We construe Mr. Anderson's pro se complaint liberally. *Hall v. Bellmon*, 935 F. 2d 1106, 1110 (10th Cir. 1991).

Section 1983 provides a federal cause of action against any person who acting under color of state law, deprives another of his federal rights." *Conn. v. Gabbert*, 526 U. S. 286, 290 (1999). Liability attaches only to conduct occurring under color of state law, and conduct constituting "state action" under the Fourteenth Amendment satisfies this requirement. *Lugar v. Edmondson Oil Co.*, 457 U. S. 922, 935 & n. 18 (1982). "[T]he under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U. S. 40, 50 (1999) (internal quotations marks omitted).

Private conduct constitutes state action, however if it is "fairly attributable to the State." *Lugar*, 457 U. S. At 937; see also *Scott v. Hern*, 216 F. 3d 897, 906 (10th Cir. 2000) This requirement is satisfied if two conditions are met: (1) "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible" and (2) the private party charged with

the deprivation "must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Lugar*, 457 U. S. At 937.

The actions by defendants that Mr. Anderson complains of do not satisfy either of the *Lugar* conditions. He does not contend that the Utah eviction statutes are themselves unconstitutional. Instead, he alleges only a private misuse of state laws, undertaken by parties who allegedly misled a state court judge. The actions taken by defendants to mislead Judge Anderson did not represent the "exercise of some right or privilege created by the State," *id.*; rather, their alleged actions, which Anderson contends were unlawful under state law, *violated* state policy. Their conduct cannot therefore be attributed to the State, and consequently it fails the first prong of *Lugar*. See *Yanaki v. Iomed, Inc.*, 415 F.3d 1204, 1209 (10th Cir. 2005). We further note that "[t]o hold otherwise would open the door wide to every aggrieved litigant in a state court proceeding, and set the federal courts up as arbiter of the correctness of every state decision." *id.* (internal quotations marks and brackets omitted).

Nor do the defendants' actions satisfy the second *Lugar* condition. They were not "state actors." First, although Mr. Anderson has named as defendants the attorneys who opposed him in the eviction proceeding, the "vast weight of authority" holds that "private

attorneys, by virtue of being officers of the court doe not act under color of state law within the meaning of section 1983." *Barnard v. Young*, 720 F. 2d 1188, 1199 (10th Cir. 1983). Second, while state action can be present if a private party is a 'willing participant in joint action with the State or its agents,'" *Gallagher v. Neil Young Freedom Concert*, 49 F. 3d 1442, 1453 (10th Cir. 1995) (quoting *Dennis v. Sparks*, 449 U. S. 24, 27 (1980), "the mere acquiescence of a state official in the actions of a private party is not sufficient," *id.* (citing *Flagg Bros. v. Brooks*, 436 U. S. 149, 164 (1978). "[C]onstitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U. S. 991, 1004 (1982). Again, defendants' actions in allegedly misleading a state court judge did not constitute joint action between defendants and the judge. Nor does Mr. Anderson present any other basis from which we could conclude that defendants' conduct is "otherwise chargeable to the State." *Lugar* 457 U. S. at 937.

As noted, Mr. Anderson alleged alternatively in his complaint that defendants acted in collusion with Judge Anderson to seize his property. To the extent that he thereby attempted to plead a conspiracy to deprive him of his constitutional rights, his complaint also failed to state a claim under § 1983. When a plaintiff in a § 1983 action attempts to assert the necessary 'state action' by implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual

averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action." *Scott*, 216 F.3d at 907 (internal quotation marks omitted). Such facts are conspicuously absent from Mr. Anderson's complaint.

Finally, Mr. Anderson challenges the dismissal of his supplemental state claims. In accordance with 28 U. S. C. § 1367(c)(3), a district court has the discretion to decline to exercise supplemental jurisdiction over a state-law claim if "the district court has dismissed all claims over which it has original jurisdiction." *See also Smith v. City of Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998) (When all federal claims have been dismissed, the court may, and usually should decline to exercise jurisdiction over any remaining state claims.") We discern no abuse of discretion in the district court's dismissal of the supplemental state claims.

CONCLUSION

The judgment of the district court is AFFIRMED.

[filed July 30, 2010]

Entered for the Court

Wade Brorby
Senior Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

GREG ANDERSON Plaintiff, vs. DANIEL KITCHEN, et al, Defendants.	ORDER AND MEMORANDUM DECISION Case No 2:09-CV-362-TC

In this case Plaintiff Greg Anderson alleges that the Defendants have violated his Constitutional right to due process in an underlying state court case and requests relief under 42 U. S. C. § 1983. He also makes several claims for relief under state law. Because the Defendants cannot fairly be said to be state actors for purposes of § 1983 of the Fourteenth Amendment, the Defendants' motion to dismiss is GRANTED. The court declines to exercise supplement jurisdiction over the remaining state law claims and those claims are DISMISSED without prejudice. 28 U. S. C. § 1367(c)(3).

BACKGROUND

The claims in this case arise out of an

underlying action in state court. In state court Mr. Anderson is a defendant in an eviction action brought by Daniel Kitchen. The parties in the eviction action contest ownership of the house that Mr. Anderson had lived in. In a preliminary ruling, after a hearing, the state court issued an eviction order requiring that possession of the home be given to Mr. Kitchen. At this time, the eviction order is preliminary order and there is no final judgment in the eviction action.1

The Defendants in this case are Daniel Kitchen, Lynn Kitchen, Mark R. Kitchen, and four limited liability companies managed by members of the Kitchen family (Sand Bay, L.L.C., Sun Lake, L.L.C. Roosevelt Hills, L.L.C. and Orchid Beach, L. L. C.). In addition, the complaint names Terry Welch, James Ahlstrom and Clark McCellan, attorneys who represented Daniel Kitchen in the eviction action.

In his complaint, Mr. Anderson alleges that he was evicted from his home without due process of law because the state court judge, Judge Anderson did not hold a trial. Mr. Anderson maintains that the Defendants willfully provided false and misleading information to the trial court in order to obtain a ruling in their favor.

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1. In addition to the eviction action, Mr. Anderson has filed a lawsuit in state court alleging the same law claims that are presently in this action

He contends that these false and misleading statements deprived Mr. Anderson of his right to a trial and caused the unlawful repossession of the home. (Compl. At 25.) He also alleges "[t]hrough information and belief there is some type of collusion and/or quid pro quo going on between Defendant Clark McClellan, his law firm and Judge Anderson in numerous actions in the Eighth District Court." (Id at 22.)

STANDARD OF REVIEW

In considering a motion to dismiss "[a]ll well-pleaded facts, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to the nonmoving party." Teigen v. Renfrow, 511 F.3d 1072, 1078 (10th Cir. 2007. A complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U. S. 544, 570 (2007) "A complaint will survive dismissal only if it alleges a plausible claim for relief–that is, the '[f]actual allegations must be enough to raise a right to relief above the speculative level.' Dias v. City and County of Denver, 567 F.3d 1169, 1178 (10th Cir. 2009) (quoting Twombly, 550 U. S. At 555). Under this standard,

> the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff

> has a reasonable likelihood of mustering factual support for these claims.

Robbins v. Oklahoma 519 F.3d 1242, 1247 (10 Cir. 2008) Although detailed factual pleading is not required, "allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action . . . will not do." Id. (quotations omitted). As the Tenth Circuit explained,

> The Twombly Court was particularly critical of complaints that "mention no specific time, Place, or person involved in the alleged conspiracies." 127 S. Ct. At 1971 n. 10. Given such a complaint, "a defendant seeking to respond to plaintiffs' conclusory allegations . . . would have little idea where to begin." Id.

Robbins, 519 F. 3d at 1247

ANALYSIS

The Defendants argue that the complaint should be dismissed because they are not state actors as required by § 1983. To state a claim under § 1983, a plaintiff must show that he has been deprived of a federal right and that the deprivation occurred " under color of law."[2] Flagg Bros., Inc. v. Brooks, 436 U. S.

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2 Mr. Anderson argues that his suit was brought

149, 155, 56 (1978). To qualify as state action, "the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." Lugar v. Edmonson Oil Co., Inc., 457 U. S. 922, 937 (1982). Fair attribution can occur when the deprivation is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." Id. In addition,

> the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. There is no question that the Defendants are not state officials. Accordingly, the question is whether they acted with state officials or their conduct is otherwise chargeable to the state. In his complaint, Mr. Anderson presents two theories.3 First that the

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under the Fourteenth Amendment, not 42 U. S. C § 1983 Any such distinction is meaningless in the context of state action because "the statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical." Lugar v Edmonson Oil Co , Inc., 457 U. S. 922, 929 (1982).

3Mr. Anderson is proceeding pro se in this matter and the

defendants conspired with each other to give Judge Anderson false information and mislead him into making an erroneous decision. Second, that the Defendants conspired with Judge Anderson to deprive him of his right to due process.

I. Misleading the State Court

The question of whether there is § 1983 liability for private citizens who obtain an order from a state court that violates due process has been decided by the Tenth Circuit. In Yanaki v. Iomed, Inc. 415 F. 3d 1204, 1208-09 (10th Cir 2005), the court considered whether private parties and attorneys were liable under § 1983 for obtaining an ex parte order directing police to make a search of the plaintiffs' home. The Yanaki court applied the Supreme Court's decision in Lugar, to a case "where private parties only were involved in state court litigation and it is alleged that the order granted by the court is not only erroneous but infringes one party's rights to procedural due process." Id. at 1208-09 (quotations omitted). The court concluded,

> We do not think the "color of law' reference in § 1983 was intended to encompass a case such as this one, where the only infirmities are the excesses of the court order itself, subject to

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court will read his complaint liberally. Hall v. Bellmon, 935 F. 2d 1106 1110 (10th Cir. 1991)

> immediate modification by a court having jurisdiction over the parties, and subject to the normal processes of appeal.

Id. At 1208-09 (quoting Torres v. First State Bank of Sierra County, 588 F. 2d 1322, 1325-27 (10th Cir. 1978)). Like the situation in Yanaki, the state court in this case is alleged to have issued an order that violates due process. Also like Yanaki, that order is subject to the reconsideration of the state court and can be appealed upon entry of final judgment. Consequently, there can be no § 1983 liability simply for obtaining the eviction order.

Mr. Anderson is also alleging that the Defendants misused the state's apparatus to obtain a ruling. But where a party has misled the state to issue an incorrect ruling, there is no way that the challenged conduct can be fairly charged to the state. Applying Lugar, Tenth Circuit explained in Yanaki,

> [plaintiffs] do not challenge the constitutionality of the state laws under which the Search and Enforcement Orders were issued. Indeed, Plaintiffs assert that issuance of the Orders was unlawful under state law. Without a challenge to the constitutionally of the state laws underlying the Search Order and accompanying Enforcement Order, the conduct of which Plaintiffs complain cannot be attributed to a decision of the

> state because "[Defendants] were acting contrary to the relevant policy articulated by the State." Lugar 457 U. S. at 940. "To hold otherwise would open the door wide to every aggrieved litigant in a state court proceeding[ ], and set the federal courts up as an arbiter of the correctness of every state court decision." Bottone v. Lindsley, 170 F. 2d 705, 707 (10th Cir. 1948). Because Plaintiffs allege nothing more than "private misuse" of state laws, their complaint fails to satisfy the first part of the color of law test as announced in Lugar. See Lugar, 457 U. S. at 941.

Yanaki, 415 F. 3d at 1209 (footnotes omitted). Mr. Anderson does not challenge the constitutionality of the state laws underlying the eviction order. Like the plaintiffs in Yanaki, he argues the eviction order was issued contrary to state law. Consequently, the alleged behavior of the Defendants in this case can only be characterized as a private misuse of state laws, cannot be charged to the state and there is no state action under Lugar.

II. Conspiracy with the Court

Although Mr. Anderson did not raise this issue in his memorandum opposing summary judgment, reading his complaint liberally, he does make a charge that the Defendants conspired with Judge Anderson to

deprive him or his rights to due process. The Supreme Court has held that when there are allegations "that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge, "those parties who conspired with the judge were acting under color of state law. Dennis v. Sparks, 449 U. S. 24, 27-29 (1980) (citations and footnote omitted).

But even reading the complaint liberally, the allegations contained in the complaint do not state a claim under the theory articulated in Dennis v. Sparks. The complaint only alleges "some sort of collusion and/or quid pro quo going on "between the court and one of the Defendants. (Compl. at 22.) Absent more concrete allegations, "a defendant seeking to respond to plaintiff's conclusory allegations . . . would have little idea where to begin." Twombley, 550 U. S. at 565 n. 10. "[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonable founded hope that the [discovery] process will reveal relevant evidence.'" Id. At 560 (quoting Dura Pharm., Inc. v. Broudo, 544 U. S. 336, 347 (2005)). Here the allegations are insufficient to suggest conspiracy. Rather, Mr. Anderson has identified an outcome which he believes unwarranted and unjust. Such an outcome alone cannot be enough to sustain a charge of conspiracy.

Mr. Anderson is frustrated and upset with the proceedings in state court. But this does not create an

opportunity for review of the state court's decision in federal court. Rather, his remedy lies in the Utah courts and the appeals process available there.

ORDER

For the foregoing reasons, the motion to dismiss the § 1983 claims is GRANTED. (Docket No. 10) The court declines to exercise supplemental jurisdiction over the remaining state law claims and they are DISMISSED without prejudice. 28 U. S. C. § 1367 (c)(3).

DATED this 18th day of November, 2009.

BY THE COURT

[signature]
TENA CAMPBELL
Chief Judge

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF
UINTAH COUNTY, STATE OF UTAH

DANIEL KITCHEN	)
	)
Plaintiff,	)
	)
vs.	) FINDINGS OF FACT
	) AND CONCLUSIONS
GREG ANDERSON	) OF LAW
	)
Defendant.	)

This matter came on for trial on October 30, 2008, on Plaintiff's Complaint for unlawful detainer. Plaintiff was present with his attorney, Clark A. McClellan. Defendant was present with his attorney, William L. Reynolds.

The court first addressed Defendant's Motion to Dismiss. The Court heard the proffer and argument of counsel on the motion. After considering the proffers

and the argument of counsel, and the and the memoranda and exhibits filed with the court, and for good cause appearing, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Daniel Kitchen ("Kitchen") is the title owner of a house and real property locate known as Lot 3 West View Acres, and located at 4748 West, 150th North, Roosevelt, Utah, 84066, that is the subject of the unlawful detainer action. Kitchen acquired title to the property from an entity in which he is a member known as Sandbay, LLC.

2. Defendant Greg Anderson ("Anderson") has possession of the house and real property, and has done since approximately June 8, 2005. Anderson through a corporation that he owns known as Anderson Property & Development, Inc., originally entered into a contract to purchase the house and property on or about June 8, 2005 from Sandbay, LLC.

3. In an addendum to the standard real estate purchase contract, Anderson's company promised to pay $50,000.00 for the house, plus repay a loan from Sandbay, LLC, of $40,000.00 which was to be used to remodel the house, plus interest. The original closing date was set for June 21, 2005.

4. The contract documents signed by the parties authorized Anderson immediate access to the

property to remodel the house. The parties agreement provided that the house be remodeled "as fast as makes sense" and that the remodel was not to exceed six months. The intent of the parties, from the language of the contract, was a quick remodel and resell of the property.

5. Kitchen's limited liability company loaned the money to Anderson's company, and Anderson began the work on the remodel. On or about September 13, 2005, the parties amended the real estate purchase contract and Kitchen's company agreed to loan Anderson's company an additional $ 15,000.00 to make more improvements to the house. The addendum to the agreement provided that the money, plus interest, would be paid at closing. The September 13, 2005 addendum did not indicate any date for closing on the house.

6. Anderson has been in the property since June 8, 2005.

7. Anderson has completed most of the remodel, but there is still some work that needs to be done.

8. Anderson has never closed on the property, nor has he tendered his performance to close on the house.

9. On or about August 20, 2008, Kitchen served Anderson with a notice to quit the property.

The notice provided that Anderson personal property, and any persons claiming a right to occupancy from Defendants. [sic]

Dated this 3rd day of December, 2008.

BY THE COURT

[signature]

John R. Anderson
District Court Judge

Approved as to Form: pat mullis

[signature]

William L. Reynolds
Attorney for Defendant

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF
UINTAH COUNTY, STATE OF UTAH

DANIEL KITCHEN	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER AND ORDER
	)	OF RESTITUTION
GREG ANDERSON	)	
	)	
Defendant.	)	

Based on the Findings of Fact and Conclusions of Law entered in this matter, the Court ORDERS, ADJUDGES AND DECREES as follows:

1. Plaintiff Daniel Kitchen is entitled to possession of the house and real property known as Lot 3 West View Acres, located at 4748 West 150th North, Roosevelt Utah, 84078

2. Defendant Anderson's right or claim to possession of the property based on the lapsed real estate purchase contract is terminated.

3. Anderson has thirty (30 days from October 30, 2008 to vacate the property and remove his personal property therefrom. If after thirty (30 days Anderson has not vacated the property and removed his personal property, the Sheriff shall take action to remove Anderson from the property.

4. Anderson shall not remove any fixture or part of the home, including any improvements that were made during the remodel and repair of the home. Anderson shall preserve the home in the condition it was after the repairs and improvements, including partial repairs and improvements , reasonable wear and tear excepted.

5. All issues with respect to attorneys fees, damages for past rent, unjust enrichment and/or damages to the property during the occupation by or removal of Anderson from the property are reserved for a future action that Anderson anticipates bringing. If Anderson does not file an action for unjust enrichment, then Kitchen can request a hearing on his damages in this matter.

6. On or before November 30, 2008, and after service of this Order, Defendant Anderson must vacate the premises located at 4748 West 150th North, Roosevelt, Utah 84066, remove his personal property,

and restore possession of the premises to the plaintiff, or be forcibly removed by a sheriff or constable. Furthermore, Anderson has the right to a hearing to contest the manner of the enforcement of the Order of Restitution. A form for requesting a hearing, together with a copy of this Order of Restitution, will be served upon Anderson is accordance with URCP 4.

7. If Anderson fails to comply with the Order of Restitution, the sheriff or constable may, at the direction of Plaintiff, enter the premises by force using the least destructive means possible to remove Anderson, his personal property, and any persons claiming a right to occupancy from Anderson.

TO THE SHERIFF OR CONSTABLE:

If the defendant (s) after being served with the Order of Restitution is accordance with Utah Code Ann. 78 B-6-812 (1) fails to comply with the time period prescribed above, you are commanded to, at the Plaintiff's direction, enter the premises by force using the least destructive means possible to remove the Defendant, any [sic]

// [sic]

// [sic]

8. The parties reserve all issues with respect to attorneys fees, damages for past rent, unjust enrichment and/or damages to the property for

removal of improvements for a future action that Anderson anticipates bringing. If Anderson does not file an action for unjust enrichment, then Kitchen can request a hearing on his damages in this matter.

Dated this 3rd day of December, 2008.

BY THE COURT

[SIGNATURE]

JOHN R. ANDERSON
District Court Judge
By pat mullis

APPROVED AS TO FORM:

[SIGNATURE]

William Reynolds
Attorney for Defendant

Greg Anderson pro se
R. R. 3 Box 8049
Roosevelt, Utah 84066
Phone: 435 621-6762

EIGHTH DISTRICT COURT
COUNTY OF DUCHESNE, STATE OF UTAH

Daniel Kitchen	)	VERIFIED MEMORANDUM
	)	IN SUPPORT O MOTION TO
Plaintiff,	)	DISMISS
	)	
v.	)	CASE NO. 080800143
	)	
Greg Anderson,	)	Judge John R. Anderson
	)	
Defendant.	)	
	)	

Defendant Greg Anderson pro se, hereby requests the above entitled Court dismiss this action for the following reasons.

A. Plaintiff has failed to state a claim upon which relief can be granted pursuant to URCP 12 (b)(6) and URCP 12 (b)(3).

B. Defendant is a purchaser of the property

in question, and the property has been paid for in full. (Civil Number 080800506)

C. The *Occupying Claimants* U. C. A. 57-6-1, 2, 3, statute prevents Plaintiff Dan Kitchen from any eviction until the ownership of Defendant's home is adjudicated. An action was filed on July 30, 2008 in Eighth District Court in Vernal, Utah for the adjudication of the ownership of Defendant's home among other causes of action.

STATEMENT OF THE FACTS

1. On or about June 13, 2005, Defendant entered into a Real Estate Purchase Contract (REPC) with Daniel Kitchen to purchase the house that is the subject of this action, and is acknowledged by Plaintiff in the second paragraph of his complaint.

2. The purchase price of the property is for $50,000 plus $55,000 for remodeling the property, for a total purchase price of $105,000.

3. The REPC between Dan kitchen and Defendant was taken to a title company to complete the transaction. The title company found a "Notice of Interest" on the property, and would not insure the property with the cloud on the title. Plaintiff's failure in clearing the cloud on the title prevented Defendant from closing on the property. The cloud still remains on the property. (See Exhibit "A" Commitment for Title Insurance)

4. The house is 3500 square feet, with 1750 on the main floor, and 1750 in the walk out basement. The basement was unfinished when Defendant purchased the property from Plaintiff.

5. The house was in shambles, and was a toss up between being a tear down, and a fixer upper. The water pipes were made of polybutylene, and leaked in 20 or more areas of the house. Electrical lines were hanging throughout the basement. There was no furnace in the house. The roof leaked. The Kitchen cabinets were broken, and the sink leaked, and had damaged the floor. The entire basement ceiling had to be structurally reinforced. There were two bathrooms that were unusable. There were dead rats throughout the house.

6. Defendant replaced the roof, replaced the polybutylene waterlines with all new copper water lines, rewired the entire house, put a furnace in the house, and finished the basement. The house now has two kitchens with new cabinets and ceramic tile on the counter tops and floor, four bathrooms, seven bedrooms and a recreation room. About $10,000 needs to be spent to get the house in near perfect condition. The house is now worth more than $275,000.

7. At the time Defendant purchased the property from Plaintiff, Defendant noticed that the Uintah Basin was in extreme need of rental housing because of the numerous people coming into the area for the "Oil Boom."

8. On or about September 5, 2005, Defendant entered into another agreement with Plaintiff, and Plaintiff's family to build houses and duplexes in the area for the purpose of renting them out. (See Exhibit "B" Greg Anderson Complaint against Plaintiff and others, filed in Eighth District Court in Uintah County)

9. The basic agreement is that all of the properties purchased by Plaintiff would go into Sand Bay LLC whose job it would be to act as a fiduciary for each side of the partnership. Each side of the partnership would receive 50% of the profits. The agreement was that the Parties would purchase raw land, building lots, homes, etc., and then develop these assets jointly. It was agreed that Defendant would do the work, and the Kitchen family would put up the monies needed for the projects.

10. Pursuant to the partnership agreement, Plaintiff purchased all of the partnership properties through Real Estate Purchase Contracts (REPC's) in his name which consisted of, two farms in Uintah County, a 77 acre tract of land near Myton, 21 building lots in various locations, approximately 7.6 acres in Fort Duchesne, and 43 acres in Fort Duchesne which has not closed because of legal problems. All of the properties were assigned by Defendant to Sand Bay LLC, except the two farms, which were put into Orchid Beach LLC, which Defendants stated was for the purpose of exercising the advantages a 1031 exchange. The partnership also owns a Track-hoe, and

equipment needed to place modular and manufactured homes on foundations.

11. Defendant as part of his work for the partnership, performed the following: (a) placed seven houses on foundations and remodeled those houses; (b) completely remodeled another house in Duchesne; (c) cleaned up the farms; (d) dug a trench to help alleviate the structural problems on one on the houses on the Fort Duchesne farm so that it could be sold or rented;. (e) Defendant purchased building permits for six duplexes; (f) dug holes for the foundations, and did all of the rough plumbing. (g) Defendant hooked up the sewer to the farm house in Fort Duchesne, and fixed the plumbing, painted, (h) and has done nothing except very work for the partnership for nearly 3 years. (i) Defendant has put approximately $50,000 of his own money in the partnership properties.

12. It was agreed that all of the titles to properties of the partnership would be placed in Sand Bay LLC, and that Plaintiff Dan Kitchen would act as fiduciary and be responsible for dividing the profits. The partnership to date owes Defendant approximately $300,000. Sand Bay LLC also holds title to Defendant's house (See Exhibit "A"), therefore Defendant has paid Sand Bay LLC for the house, but has not been credited by Sand Bay LLC in the form of a deed.

PLAINTIFF HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Inasmuch as plaintiff has failed to show how defendants purchase of the home changed to Defendant to being a renter, which never happened, Plaintiff has failed to state a claim upon which relief can be granted and his complaint should be dismissed. Plaintiff's Notice To Terminate Tenancy, characterized Defendant as being a tenant, even though he admits in his complaint that Defendant is a purchaser of the home. Plaintiff's notice on it's face is defective.

> In unlawful detainer action, defective notice results in failure to state a claim. . . . U. C. A. 1953, 78-36-3, *Sovereen v. Meadows* 1979, 595 P.2d 852.

Also see *Fireman's Ins. Co v. Brown*, 1974 529 P.2d 419, where the Utah Supreme Court stated:

> Where purchaser under real estate contract failed to make monthly payments from April 1 1972 to March 1, 1973, vender, before she was entitled to serve a notice to quit, should have filed notice of default and demand performance. . . . U. C. A. 1953, 78-36-3(5).

In the action at bar it is Plaintiff who has not cleared the title to the property, and it is Plaintiff who has been paid in full and still owes Defendant approximately $195,000 after he credits Defendant with payment in full for the subject property.

Furthermore, assuming plaintiff was not paid in full by Defendant, he does not have a right to rescind the RECP because he has not provided Defendant marketable title to the home pursuant to the Marketable Title Act. In 17Am Jur 2d §555 it states:

> The right to rescind or terminate a contract on the ground of failure to performance by the opposite party belongs only to the party who is free from substantial default himself.

DEFENDANT IS A PURCHASER OF THE PROPERTY AND THE PROPERTY HAS BEEN PAID FOR IN FULL.

Defendant has paid for the property in full inasmuch as defendant is a partner in other ventures, with Plaintiff and it is Plaintiff who failed to pay Defendant as follows.

On or about the spring of 2006, Defendant purchased 4 lots in Ballard, all near 1500 East and 2700 South, for a total purchase price of $24,500., pursuant to a REPC, in Defendant's name and assigned the lots to Plaintiff pursuant to the partnership agreement between the parties.

Defendant sold one of the lots to Roxie Russell, for $18,900., and Plaintiff kept all of the money. Plaintiff then sold or gave the remaining three lots to the Mormon Church, and paid Defendant nothing.

The lots are now worth at least $30,000, which added together with the lot sold to Russell is $108,900, minus the four lot purchase price of $24,500 is $84,500, divided by 2, leaves Plaintiff/partnership owing Defendant $42,200 on that transaction.

On or about the Spring of 2006 Defendant purchased a home in Duchesne located at 439 South 570 East. Defendant purchased the property for $80,500 and assigned the house to Plaintiff pursuant to the partnership agreement. Defendant remodeled the house for an approximate cost of $25,000, which put the partnership in the house approximately $105,000. The house was sold for approximately $150,000, and after paying closing costs, brokerage fees, etc., Plaintiff claims the net of the proceeds was about $130,000.

The partnership agreement was that for any house sold or rented, Defendant was to receive $3,000 plus one half of the net proceeds. Therefore Plaintiff owes Defendant at least $11,500 plus interest to date.

In the Winter or Spring of 2008, Defendant sold the house located at 5934 East, 300 North for $169,000, to Jeff Hall. The house was owned by the partnership. The approximate cost of the house to the partnership was $107,000. Defendant is owed on that house approximately $32,500.

In the Winter of 2008, Defendant sold the house located at 5825 East, 300 North for $189,000 to Jeff

Houston. The house was owned by the partnership. Defendant used the $5,000 down payment to continue the remodeling of other houses in the partnership, which would for easy math purposes reduce the sales price to $184,000. The approximate cost of the house to the partnership was $107,000. Defendant is owed on that house approximately $41,500., which includes Defendants $3,000 agreed fee for each house sold or rented.

In the Winter or Spring of 2008, Defendant sold the house located at 5865 East, 300 North for $208,000 to Sidney R. Jensen. The house was owned by the partnership. Defendant used approximately $8,000 down payment, and monthly payments to continue the remodeling of other houses in the partnership, which would for easy math purposes would reduce the sales price to $200,000. The approximate cost of the house to the partnership was $125,000, because the partnership spent more on that house by finishing two rooms in the basement. Net to the partnership on that house is approximately $75,000. Defendant with his $3000 fee is owed on that house approximately $39,000.

Furthermore, there is a home owned by the partnership located at 1224 West North Myton Bench Road worth $215,000. The property was rented with an option to purchase, but is now vacant. Another home owned by the partnership is located at 5870 East 300 North. Defendant has a potential purchaser for the home for $192,000. The house needs about $5,000

to finish it. The house should net $81,000 to the partnership. Another house owned by the partnership is located at 5891 East, 300 North. The home should sell for about $210,000 when finished. The home needs about $18,000 additional dollars to be finished properly. The home should net $87,000 to the partnership.

All of the above projects could have been completed in less than one year, but Plaintiff was miserably slow in providing the monies needed to finish the projects. One of the projects was for six duplex's located on 9500 East in Gusher. After providing money for building permits, digging holes for the basements, sub rough plumbing, and permits for septic systems, Plaintiff said he changed his mind and did not want to do the project. The partnership spent about $45,000 on the duplex project before it was abandoned by Plaintiff, which does not include the cost of the lots. Defendant put a large amount of time in the duplex project, and Plaintiff owes Defendant for his work. Plaintiff now plans to sell the duplex lots and give Defendant nothing.

The above is just a partial list of items performed by Defendant, which more than pays for Defendants house.

In the case filed in Uintah County, Defendant (Plaintiff in the Uintah County action), has ask for a division of the assets of the partnership. Most all of the Real assets of the partnership are located in

Uintah County, therefore proper venue is in Uintah County, (URCP 12 (b)(3)), therefore this action should be dismissed.

THE *Occupying Claimants*, STATUTE U. C. A. 57-6-1, 2, 3, PREVENTS PLAINTIFF, DAN KITCHEN FROM ANY EVICTION OF DEFENDANT UNTIL THE OWNERSHIP OF DEFENDANT'S HOME IS ADJUDICATED. AN ACTION WAS FILED ON JULY 30, 2008 IN EIGHTH DISTRICT COURT IN VERNAL, UTAH FOR THE ADJUDICATION OF THE OWNERSHIP OF DEFENDANT'S HOME AMONG OTHER CAUSES OF ACTION. THAT ACTION IS BEFORE JUDGE PAYNE, AND THE CIVIL NUMBER IS 080800506. A COPY OF THE VERIFIED COMPLAINT IS ATTACHED. IN THAT ACTION PLAINTIFF (DEFENDANT IN THIS ACTION) ACKNOWLEDGES A SET-OFF TO SAND BAY LLC, FOR PAYMENT FOR HIS HOUSE.

On or about July 30, 2008, Defendant filed an action against the other side of the partnership, which includes Plaintiff in this action. Plaintiff's proper action would be to answer that complaint, and if he has issues, he should counterclaim. This action filed by Plaintiff in the action at bar was simply meant to harass and impede Defendant. In *Lincoln Financial Corp. v. Ferrier*, (Utah 1977) 567 P.2d 1102, the Utah Supreme Court stated:

> If lessee has proper counterclaim arising out of same transaction or

> business as subject matter of unlawful detainer complaint by lessor, it could be asserted to end that all of whatever controversy exists between parties may be settled as simply and expeditiously as possible by allowing all legitimate claims, defenses and counterclaims relating thereto in one action. U.C.A. 1953 78-36-10 Rules of Civil Procedure 1, 13.

In the action at bar, defendant is not a renter or leaser, but a purchaser of the property, and the payment for the property is simply a matter of proper accounting.

CONCLUSION

Plaintiff has failed to state a claim upon which relief can be granted. Defendant is not a tenant, but a purchaser of the property, which defendant admits in paragraph 2 of his complaint, and has offered no writing to show anything different, nor can he. It is Plaintiff who has not performed, not Defendant. The house has been paid for in full, and Plaintiff through the partnership, still owes Defendant a substantial amount of money. The issue is before the Court in Uintah County, This action should be dismissed because Plaintiff has failed to state a claim upon which relief can be granted.

[signature]

Greg Anderson

ACKNOWLEDGMENT

County of Salt Lake)
) ss
State of Utah)

On the 9TH day of September 2008, before me appeared Greg Anderson who swore to and acknowledged the above document.

[signature]

Greg Anderson

[signature]

Notary Public

BRIAN D. FULLMER
NOTARY PUBLIC
STATE OF UTAH
115 EAST 1300
SOUTH SALT LAKE
CITY UTAH 84115
MY COMMISSION
EXPIRES. 09/ 26/ 2010

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IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR DUCHESNE COUNTY,STATE OF UTAH

DANIEL KITCHEN	)	DECLARATION OF DANIEL KITCHEN
Plaintiff,	)	Case No.080800143
v.	)	Judge John R. Anderson
GREG ANDERSON	)	
Defendant.	)	

I Daniel Kitchen, declare as follows:

1. I am the plaintiff in this lawsuit. I make this affidavit based on personal knowledge and the contents of business records known by me to be maintained in the ordinary course of business, and which I believe to be true. I have personal knowledge of the statements and matters set forth herein and , if called to testify, would testify as follows.

2. I currently own the property located at 4748 West 150th North in Roosevelt, Utah (the "Property), having received conveyance of the Property from Sand Bay LLC. The Property is described in a Real Estate Purchase Contract dated June 13, 2005 ("the Purchase Contract") as Lot 3, West View Acres. I previously submitted the Purchase Contract to the Court concurrently with the Complaint.

3. The Purchase Contract states a settlement/closing deadline of June 21, 2005.

4. An addendum to the Purchase Contract discusses a loan provided to Greg Anderson to be used to fund remodeling improvements done to the Property, which loan he was suppose to repay at a rate of 10% interest. That addendum specifically states our understanding that any such remodeling work was to be done within six months of the date of the Purchase Agreement (i.e., on or before December 13, 2005.

5. Mr. Anderson never approached me or anyone else affiliated with Sand Bay LLC about closing on the Purchase of the Property, and the time

for him to do so has elapsed.

6. Mr. Anderson also never completed remodeling/repair work on the Property within six (6) months (or even through today).

7. Mr. Anderson has never made any payments on the loan referenced in the addendum.

8. Yet Mr. Anderson has remained in possession of the Property, within paying anything for this right to live in someone else's property, for thepast three years.

9. This eviction action was commenced to reclaim the Property that never has been owned by Greg Anderson, which he nevertheless continues to seek to live for free.

10. Mr. Anderson is not owed any money related to what he claims to be a partnership/joint venture. Those issues will be resolved in a separate proceeding filed by him in Vernal.

11. I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

DATED this 29th day of September, 2008

[signature]
Daniel Kitchen